

- “1. The claimant did not meet with personal injury by accident arising out of and in the course of his [sic] employment with United Parcel Service on date found.
- “2. The claimant did not file timely written claim or Application for Hearing as required by statute.

- “3. The court made finding for vocational assessment; said assessment cannot be legally ordered for any date of accident of any timely filed claim.
- “4. Temporary partial benefits are inappropriate.”

However, in respondent's brief the issues were described differently. In that document respondent argued as follows: “The claimant's request for Workers' Compensation Benefits is barred because she did not file an Application for Hearing in a timely fashion. Additionally, if it is determined that an Application for Hearing was timely filed vocational assessment and total [sic] partial disability benefits should be denied because the date of accident occurred after July 1, 1993.”

The resolution of the issues raised in respondent's brief depend upon the determination as to the date of accident. As will be hereinafter explained, the issue of claimant's accident date will also be dispositive of this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing that the Order for Compensation should be modified as to date of accident but should, otherwise, be affirmed.

Claimant's initial injury occurred when she walked into a metal beam, striking her head and right shoulder. She was knocked off her feet and landed on the ground. She denied being rendered unconscious but described “seeing stars.” Although the Assistant Director found this accident to have occurred on October 15, 1990, our review of the record indicates that this accident actually occurred on October 19, 1990. Claimant testified that she went that same day to Dr. A. Dick Geiss. His initial office note, which is Claimant's Exhibit 1 to the preliminary hearing transcript, shows that he saw claimant on October 19, 1990. Therefore, the Order of the Assistant Director should be modified to find claimant's accident occurred on October 19, 1990.

As noted above, respondent, in its Request for Board Review, alleged that claimant did not meet with personal injury by accident arising out of and in the course of employment with respondent and that claimant did not file timely written claim. Those issues appear to have been abandoned by respondent in its brief, relying instead upon timely application for hearing and/or date of accident to deny claimant's entitlement to the vocational rehabilitation benefits awarded by the Assistant Director. Furthermore, it is noted that counsel for respondent made the following announcement to the Court during the preliminary hearing:

“Mr. McManus: Just to save some time, we’re not denying accident. We obviously have paid the treatment. If we can just get to the issues which are TTD at the present time and the voc rehab which would deal with which was the correct date of accident, we don’t need to go through all the medical from all the various dates of accident.” (Prel. Hr’g at 11.)

The Appeals Board finds that accidental injury arising out of and in the course of employment was admitted by respondent for purposes of preliminary hearing. In addition, timely written claim and timely application for hearing were not raised as defenses by counsel for respondent at preliminary hearing. At pages 49 and 50 of the preliminary hearing transcript counsel for respondent makes it clear that the only issue is the date of accident. Respondent contends that claimant suffered additional injury after October 19, 1990, such that this claim would be considered a “new act” case that is subject to the July 1, 1993, amendments to the Workers Compensation Act. Although claimant admits a worsening of her symptoms after October 19, 1990, she denies additional accident or injury. Claimant denies a permanent aggravation of her condition. Her testimony is that her symptoms would increase and diminish depending upon her activity and workload. She would have good days and bad days but she consistently attributes her problems to the October 19, 1990, accident. There is no medical evidence of a permanent aggravation, worsening, or a new injury. Based upon the record as it currently exists, the Appeals Board finds that claimant’s accident date was October 19, 1990.

The evidence shows claimant’s Application for Hearing was filed within two years of the last payment of compensation as required by K.S.A. 44-534(b), as amended. Respondent attempts to raise an issue on appeal concerning timely application for hearing based upon a gap in claimant’s medical treatment. This issue will not be addressed. Respondent cannot limit claimant’s evidence at preliminary hearing by announcing “we don’t need to go through all the medical” and then on appeal complain that claimant failed to meet her burden of proving a continuous course of medical treatment. Respondent waived the issue of timely application for hearing before the Administrative Law Judge for purposes of preliminary hearing. It cannot now be raised for the first time on appeal. To hold otherwise would place the Appeals Board in the position of attempting to decide the issue based upon an incomplete record and would deny claimant the benefits of evidence that may have been presented if she had been aware that there remained a disputed issue at preliminary hearing. See Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P. 2d 771 (1966). Accordingly, the Assistant Director did not exceed his jurisdiction in ordering the vocational assessment and the payment of temporary partial disability compensation in association therewith.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that, with the exception of the finding as to date of accident, the preliminary hearing Order for

Compensation entered by Assistant Director Brad E. Avery dated August 23, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

c: Kimberly Y. Divers, Topeka, KS
 Roger Fincher, Topeka, KS
 Frederick J. Greenbaum, Kansas City, KS
 Brad E. Avery, Assistant Director
 Bryce Benedict, Administrative Law Judge
 Philip S. Harness, Director